Supreme Court, U.S.
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NO. _____

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**In the**
**SUPREME COURT OF THE UNITED STATES**

October Term, 1993

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JANET LIERENZ, *Petitioner*

vs.

MAX BOWEN,
REGAN L. LUTZKO,
ROBERT J. HILL,

*Respondents*

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On Petition for Writ of Certiorari to the
Erie County Court of Appeals of Ohio

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# PETITION FOR WRIT OF CERTIORARI

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J. MICHAEL GOLDBERG
*Counsel of Record*

75 Public Square
Suite 1020
Cleveland, Ohio 44113
(216) 621-1375
*Counsel for Petitioner*

PEGGY HONIG
458 Leader Building
Cleveland, Ohio 44114
*Co-counsel for Petitioner*

24 pp

## QUESTIONS PRESENTED

Whether an appellate court deprives a non-appealing party of a substantial property right when it dismisses her cause of action because of a defect in the caption of the pleadings, where: 1) she had received no notice that the action might be dismissed; 2) the trial court had found and ruled that there was no defect; and 3) the pleading defect would have been curable had the appellate court remanded the case to the trial court. U.S. Const. Amend. XIV, Section 1.

Whether an appellate court deprives a non-appealing party of her right to trial by jury when it reverses judgment on a jury's unanimous verdict in favor of the non-appealing party and dismisses that party's cause of action because of a curable pleading defect. U.S. Const. Amend. VII; U.S. Const. Amend. XIV, Section 1.

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# PETITION FOR WRIT OF CERTIORARI TO THE ERIE COUNTY COURT OF APPEALS OF OHIO

---

JANET LIERENZ respectfully petitions for a writ of certiorari to review the judgment of the Erie County Court of Appeals of Ohio in this case.

## OPINIONS BELOW

The unpublished written opinion of the Erie County Court of Appeals of Ohio appears in ***Appendix A*** to this Petition. The unpublished ruling of the Ohio Supreme Court appears in ***Appendix J*** to this Petition.

## JURISDICTION

The Erie County Court of Appeals of Ohio entered its judgment on January 14, 1994. The Ohio Supreme Court entered its judgment on June 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

## STATUTORY PROVISIONS INVOLVED

**Section 1 of the Fourteenth Amendment to the United States Constitution** provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *"

**Article I, Section 16 of the Ohio Constitution** provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

**The Seventh Amendment to the United States Constitution** provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

**Article I, Section 5 of the Ohio Constitution** provides: "The right of trial by jury shall be inviolate,

except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

## STATEMENT OF THE CASE

Background

Petitioner's cause of action arose in 1985 out of a contract dispute between Karl R. Lierenz, deceased, and the Respondents d/b/a Crown Motel. In April 1988, Petitioner Janet Lierenz, duly appointed executrix of her late husband Karl's estate, filed a lawsuit against Respondents.

The civil lawsuit was filed and maintained in the ***Erie*** County Court of Common Pleas. Karl Lierenz' Last Will was probated in the ***Huron*** County Probate Court. Petitioner was the sole legatee under her late husband's Last Will.

In February 1990, the trial court granted Respondent's motion for summary judgment and dismissed Petitioner's complaint. Petitioner filed a timely notice of appeal.

While the appeal was pending, Petitioner's probate attorney filed a final accounting in the probate court. The probate court filed an entry approving and settling the account and discharged Petitioner from her duties as executrix of her late husband's estate. In March 1991, the court of appeals reversed the trial court's ruling and reinstated Petitioner's complaint.

The trial court's ruling which was assigned as error in the appellate court

In January 1992 – ten months later – Respondents filed a motion to dismiss Petitioner's complaint on the ground that she lacked authority to maintain the litigation.[1] Petitioner opposed the motion, and in March 1992, the trial court denied Respondents' motion.[2]

Trial

Trial commenced on July 6, 1992. The parties presented evidence, testimony and argument for three days. After more than three hours of deliberation, the jury returned a unanimous verdict in favor of Petitioner and against all Respondents.

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[1] Respondents claimed that Petitioner's civil contract claim was barred by the doctrine of *res judicata* because the probate court had settled and approved the final account. Of course, there was neither identity of parties nor identity of issues between the probate court and the common pleas court.

[2] The trial court properly denied Respondents' motion. Respondents were neither creditors nor beneficiaries of the probate estate – they were debtors. The trial court recognized the absurdity of relieving Respondents of their liability on a civil contract claim because the estate to which the Respondents were liable – and which Respondents had refused to pay – had listed their account as uncollectible.

On October 8, 1992, upon Petitioner's motion, the Huron County Probate Court vacated its prior order and reinstated Petitioner as executrix. Shortly thereafter, on November 12th, the Erie County trial court entered judgment on the jury's verdict of July 9th.

Appeal to the Erie County Court of Appeals

Respondents filed a notice of appeal in the Erie County (Sixth District) Court of Appeals of Ohio. In their sole assignment of error, Respondents claimed that the trial court erred in overruling their motion to dismiss the complaint. Petitioner filed a notice of cross-appeal, and asserted in her assignment of error that the trial court erred in not granting her motion for prejudgment interest.

On January 14, 1994, the Erie County Court of Appeals issued its written Decision and Judgment Entry, reversing the trial court and dismissing Petitioner's cause of action. In its two-to-one decision, the majority found that Petitioner "was no longer the executrix of the estate and did not have the authority to maintain an action on behalf of the estate."[3] *Appendix A.*

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[3] The majority improperly focused its analysis on the proceedings in the Huron County Probate Court and, upon its implicit finding that the probate court had improperly reinstated Petitioner as executrix, completely disregarded the probate court's order of reinstatement. Judge Melvin L. Resnick filed a dissenting opinion, the full text of which is contained in *Appendix A.*

Appeal to the Ohio Supreme Court

On February 14, 1994, Petitioner filed a timely jurisdictional notice of appeal to the Ohio Supreme Court. *Appendix B.*

Upon motion, the court granted Petitioner an extension motion to file her *Memorandum in Support of [Ohio] Supreme Court Jurisdiction* (hereinafter, "*Memorandum*"). On Friday, April 15, 1994, Petitioner filed a timely second motion for extension of time, requesting fourteen days within which to file the *Memorandum.* The court denied the motion in an entry dated Monday, April 18th.[4]

On April 26, 1994, Petitioner filed a motion for leave to file the *Memorandum* instanter. *Appendix F.* At the same time, Petitioner filed her *Memorandum* in the Ohio Supreme Court. *Appendix G.*

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[4] Petitioner's motions for extension of time may be found in *Appendix C* and *Appendix D*, respectively. The court's entry denying Petitioner's second motion may be found in *Appendix E.* The entry was received at Petitioner's counsel's office on April 19th, while said counsel was out of the state of Ohio. Counsel returned to Ohio on Sunday, April 24th and shipped the completed *Memorandum* via Federal Express on Monday, April 25th – six days after receiving the court's entry.

Federal Questions Raised in the *Memorandum in Support of [Ohio] Supreme Court Jurisdiction*

Petitioner raised both state and federal constitutional issues in her *Memorandum in Support of Ohio Supreme Court Jurisdiction.* Specifically, Petitioner asserted that the appellate court's dismissal of her cause of action violated her right to due process and her right to trial by jury.[5] The Ohio Supreme

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[5] In her *Memorandum*, Petitioner presented four (4) Propositions of Law. Propositions 1 and 3 state:

> Proposition 1: A court of appeals deprives a party of her right to due process under the due process clause of U.S. Const. Amend. XIV, Section 1, and the due course of law provision of O. Const. Art. I, Section 16, when it orders the dismissal of the non-appealing party's cause of action because of a technical defect in the complaint, where the non-appealing party was under no duty to cure the defect at the trial court level.
>
> Proposition 3: A court of appeals deprives the non-appealing party of her right to trial by jury when it reverses judgment on the jury's verdict and orders the dismissal of the non-appealing party's cause of action because of a purely technical pleading defect.

Court refused to consider the merits of Petitioner's appeal.[6]

On May 2, 1994, Petitioner filed a motion requesting reconsideration of the court's denial of Petitioner's second motion for extension of time. *Appendix H.* Respondents never objected to any of Petitioner's motions[7]. Nevertheless, on June 8, 1994, the Ohio Supreme Court denied both motions and dismissed the entire cause of action. *Appendix I.*

## REASONS FOR GRANTING THE WRIT

The Erie County Court of Appeals of Ohio deprived Petitioner of her chose in action when it dismissed her case -- without any notice whatsoever that her case was subject to dismissal. Petitioner's chose in action is a property right subject to all the procedural safeguards afforded by the Due Process Clause of Section 1, Amendment XIV to the United States Constitution.

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[6] Respondents never objected to Petitioner's motions, and Respondents neither claimed nor would have suffered prejudice by the granting of Petitioner's motion for leave to file the *Memorandum* instanter.

[7] In fact, on June 6, 1994, Respondents filed a memorandum in opposition to Petitioner's *Memorandum in Support of Supreme Court Jurisdiction.*

I. **An appellate court deprives a non-appealing party of a substantial property right when it dismisses her cause of action because of a defect in the caption of the pleadings, where: 1) she had received no notice that the action might be dismissed; 2) the trial court had found and ruled that there was no defect; and 3) the pleading defect would have been curable had the appellate court remanded the case to the trial court. U.S. Const. Amend. XIV, Section 1.**

State-created property interests are afforded protection under the Due Process Clause

Several times this Court has held that a chose in action is a constitutionally recognized property interest. **PHILLIPS PETROLEUM COMPANY v. SHUTTS**, 472 U.S. 797, 105 S. Ct. 2956, 2972; **LOGAN v. ZIMMERMAN BRUSH COMPANY**, 455 U.S. 422 at 428, 102 S. Ct. 1148 at 1154 (1982); **MULLANE v. CENTRAL HANOVER BANK & TRUST CO.**, 339 U.S. 306 at 313, 70 S. Ct. 652 at 656 (1950). A state may not constitutionally deprive a party of a state-created property interest with providing appropriate procedural safeguards. **LOGAN v. ZIMMERMAN BRUSH COMPANY**, 455 U.S. at 432, 102 S. Ct. at 1156.

The State of Ohio has conferred upon its citizens the right to seek redress in its courts:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

O. Const. Article I, Section 16. The State of Ohio has also conferred upon its citizens the right to trial by jury, which right, "being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated by either legislative act or judicial order or decree." O. Const. Article I, Section 5; **GIBBS v. GIRARD** (1913), 88 Ohio St. 34, ¶2, Syllabus by the Court.

"The [United States Supreme] Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." **LOGAN v. ZIMMERMAN BRUSH COMPANY**, 455 U.S. at 429, 102 S. Ct. at 1154. The "property" component of the Fifth Amendment's Due Process Clause imposes "constitutional limitations upon the power of courts,

> even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

*Id.* "Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be

'the equivalent of denying them an opportunity to be heard upon their claimed rights.'" *Id.*; *accord*, **BODDIE v. CONNECTICUT**, 401 U.S. 371 at 380, 91 S. Ct. 780 at 787.

The case at bar

The instant case was tried to a jury which returned a unanimous verdict in Petitioner's favor. Respondents appealed, but their sole assignment of error addressed the trial court's ruling on a technical, non-jurisdictional pleading matter. The error claimed was one of form rather than substance.[8]

The Erie County Court of Appeals filed its judgment entry dismissing Petitioner's cause of action. At no time prior to its entry of dismissal had the appellate court informed Petitioner that her case may be dismissed. The appellate court's action deprived Petitioner of her rights to redress in the court and trial by jury.

The appellate court's actions deprived Petitioner of due process

"The action of state courts in imposing penalties or depriving parties of other substantive rights without

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[8] Whether Petitioner proceeded personally or in her capacity as executrix in no way altered the nature of the claim against the Respondents. It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action.

providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment." **SHELLEY v. KRAEMER**, 334 U.S. 1 at 16, 68 S. Ct. 836 at 843; *accord*, **BRINKERHOFF-FARIS TRUST & SAVINGS CO. v. HILL**, 281 U.S. 673, 50 S. Ct. 451 ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.")

Due Process requires *meaningful* notice and the opportunity to be heard *before* property a party is deprived of a property interest

At a minimum, the words of the Fourteenth Amendment's Due Process Clause "require that deprivation of . . . property by adjudication be ***preceded*** by notice . . ." [Emphasis added] **ARMSTRONG v. MANZO**, 380 U.S. 545 at 550, 85 S. Ct. 1187 at 1190; *accord*, **MULLANE v. CENTRAL HANOVER BANK & TRUST CO.**, 339 U.S. at 313-14, 70 S. Ct. at 656-57 (1950); **BODDIE v. CONNECTICUT**, 401 U.S. 220 at 379, 91 S. Ct. 780 at 786 (1971) (A root requirement of the hearing required by due process is that an individual "be given an opportunity for a hearing ***before*** he is deprived of any significant property interest.")

The notice "must be of such nature as reasonably to convey the required information [citation omitted] and it must afford a reasonable time for those interested to make their appearance." *Id.* The Court has consistently held:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is ***notice reasonably calculated, under all the circumstances, to apprise interested parties*** of the pendency of the action ***and afford them an opportunity*** to present their objections. [citations omitted] [Emphasis added]

*Id.* "***'The right to be heard has little reality or worth unless one is informed' that a decision is contemplated.***" [Emphasis added] **BURNS v. UNITED STATES**, 111 S. Ct. 2182, 2186; *accord*, **MULLANE v. CENTRAL HANOVER BANK & TRUST CO.**, 339 U.S. at 314, 70 S. Ct. at 657.

A simple remand with instructions to the trial court would have provided due notice and a reasonable opportunity to cure

In the case at bar, the appellate court's first and only "notice" to Petitioner was that court's final judgment terminating the case. At no time throughout the entire proceedings was Petitioner advised that her case might be dismissed.

In any event, the appellate court exceeded its jurisdiction by dismissing Petitioner's case. Even assuming, *arguendo*, the propriety of the court's finding -- that Petitioner was not the real party in interest -- neither it nor the trial court could have dismissed Petitioner's case.

Petitioner filed the complaint in this case as the executrix of the estate of her deceased husband. Petitioner's husband's Last Will provided that Petitioner was the sole legatee. Therefore, regardless of whether Petitioner maintained the action as the executrix or on her own behalf as a beneficiary, she was the real party in interest.

More importantly, Ohio Civ. R. 17(A), which specifically pertains to the issue of "real party in interest," expressly states that dismissal is not appropriate when the court finds that the action is not being maintained in the name of the real party in interest. Civ. R. 17(A) provides, in relevant part;

> * * * ***No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.*** Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. (emphasis added)

Directly on point with the instant case is the Staff Note to Civ. R. 17(A), which provides, in relevant part:

> The fourth sentence of Rule 17(A) is borrowed directly from a 1966 amendment of Federal Rule 17(a). ***Assume that an administrator under a void appointment sues in good faith. Under***

> ***Rule 17(A) the action is not dismissed; instead a reasonable time is permitted until the proper administrator can be substituted in order that justice might be done.*** The 1966 amendment of Federal rule 17(a) "codifies" the principle enunciated in ***LEVINSON v. DEUPREE***, 345 U.S. 648 (1953) and ***LINK AVIATION, INC. v. DOWNS***, 325 F.2d 613 (D.D.C. 1963). * * * Rule 17(A) simply states clearly that a proper real party in interest may be substituted without the actions being dismissed. (emphasis added)

In the case at bar, both the trial court and the Petitioner believed that the Janet Lierenz was the duly appointed executrix of the estate of her husband, Karl Lierenz. Had the trial court found that Mrs. Lierenz was acting under a void appointment, then presumably it would have given her a reasonable opportunity to cure the pleading defect by substituting the name of the real party in interest, as required by Civ. R. 17(A).

II. **An appellate court deprives a non-appealing party of her right to trial by jury when it reverses judgment on a jury's unanimous verdict in favor of the non-appealing party and dismisses that party's cause of action because of a curable pleading defect. U.S. Const. Amend. VII; U.S. Const. Amend. XIV, Section 1.**

The appellate court's judgment deprived Petitioner of her right to trial by jury

The Seventh Amendment to the United States Constitution provides, in relevant part:

> In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the United States Constitution also affords protection to Petitioner's state-created right to trial by jury under Article I, Section 5 of the Ohio Constitution. Article I, Section 5 provides:

> The right to trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

The case at bar

Petitioner's contract claim, which arose during 1985, was tried to a jury seven years later. The trial lasted three days. After three hours of deliberation, the jury returned a unanimous verdict in favor of Petitioner.

On review of a claimed pleading defect, the appellate court completely disregarded the jury's verdict and reversed the trial court's judgment on the verdict.

It is axiomatic that granting a directed verdict violates a party's right of trial by jury when there exists some evidence tending to prove material facts. A party's right of trial by jury is no less violated when a court – especially an appellate court -- reverses a judgment on a jury's verdict because of a curable technical pleading defect.

The appellate court's reversal of judgment on the verdict and its dismissal of Petitioner's cause of action violated the most fundamental of rights protected under both the United States and Ohio constitutions.

## III. The appellate court can articulate no countervailing state interest to justify its dismissal of Petitioner's cause of action

The Petitioner's property interest in her chose in action far outweighs any conceivable interest of the state appellate court in terminating her case. On the record, both the appellate court's interest in dismissing the case -- and the Ohio Supreme Court's interest in refusing to entertain Petitioner's *Memorandum in Support of Jurisdiction* -- are, on the record, insubstantial and do not justify the actions taken by these courts.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

J. MICHAEL GOLDBERG
*Counsel of Record*

75 Public Square
Suite 1020
Cleveland, Ohio 44113
(216) 621-1375

*Counsel for Petitioner*

PEGGY HONIG
458 Leader Building
Cleveland, Ohio 44114

*Co-counsel for Petitioner*

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On Petition for Writ of Certiorari to the
Sixth District Court of Appeals of Ohio

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# APPENDIX
# TO PETITION FOR WRIT OF CERTIORARI

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J. MICHAEL GOLDBERG
*Counsel of Record*

75 Public Square
Suite 1020
Cleveland, Ohio 44113
(216) 621-1375
*Counsel for Petitioner*

PEGGY HONIG
458 Leader Building
Cleveland, Ohio 44114
*Co-counsel for Petitioner*

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*APPENDIX*


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| Petitioner's Motion For Extension of Time to File Memorandum in Support of [Ohio] Supreme Court Jurisdiction (Filed within rule on 3/4/94) | *APPENDIX C* |
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Petitioner's Motion For Reconsideration Re: Second Motion for Extension of Time to File Memorandum (Filed 5/2/94) *APPENDIX H*

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Amendment XIV to the United States Constitution *APPENDIX J*

IN THE COURT OF APPEALS OF ERIE COUNTY

Court of Appeals No. E-92-71
Trial Court No. 88-CV-129

---

Janet Lierenz, Executrix
Appellee/Cross-Appellants

v.

Max bowen, et al.
Appellant/Cross-Appellee

---

DECISION AND JUDGMENT ENTRY

Decided: January 14, 1994

* * * * *

Peggy Goldner and J. Michael Goldberg, for appellee/cross-appellants.

John Kirwan, for appellant/cross-appellee.

* * * * *

ABOOD, P.J. This is an accelerated appeal and cross-appeal from a judgment of the Erie County court of Common Pleas which denied appellants' motion to dismiss and appellee's motion for pre-judgment interest. Appellants/cross-appellees Max Bowen, et al. (appellants) set forth the following assignment of error:

"THE TRIAL COURT ERRED IN OVERULING (sic) DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AFTER PLAINTIFF WAS DISCHARGED IN HER REPRESENTATIVE CAPACITY AS EXECUTRIX OF THE ESTATE OF THE DECEASED."

Appellee/cross-appellant Janet Lierenz, Executrix of the Estate of Karl R. Lierenz, Sr., (appellee) sets forth the following assignment of error:

"PLAINTIFF/CROSS-APPELLANT IS ENTITLED TO PREJUDGMENT INTEREST ON THE JURY'S AWARD OF TWENTY SIX THOUSAND FIVE HUNDRED DOLLARS ON THE PARTIES' VERBAL CONTRACT, THE EXISTENCE OF WHICH WAS STIPULATED BY COUNSEL AT TRIAL AND WHOSE TERMS CLEARLY AND UNAMBIGUOUSLY STATED THAT 50 PERCENT OF THE CONTRACT AMOUNT IS DUE AND PAYABLE UPON DELIVERY OF MATERIALS, REMAINDER WAS DUE UPON COMPLETION OF THE PROJECT, WHERE: PLAINTIFF'S DECEDENT SUBSTANTIALLY AND IN GOOD FAITH COMPLETED HIS PART OF THE BARGAIN; THE AMOUNT OF MONEY DUE AND OWING WAS CLEARLY AND UNAMBIGUOUSLY STATED IN THE CONTRACT AND THESE AMOUNTS WERE -- AND TODAY REMAIN -- CAPABLE OF ASCERTAINMENT BY MERE

COMPUTATION OR ARE SUBJECT TO REASONABLY CERTAIN CALCULATIONS."

The facts that are relevant to the issues raised on appeal are as follows. On April 5, 1988, appellee, in her capacity as executrix of the estate of Karl Lierenz, filed suit against appellants, dba Crown Motel, following a contract dispute which arose after appellee's husband worked on an addition to the motel. Appellants counterclaimed and on May 9, 1989, appellee filed a motion to dismiss appellants' counterclaim. On November 22, 1989, appellants filed a motion for summary judgment. On February 26, 1990, the trial court granted both motions and dismissed the action.

On March 27, 1990, appellee filed a notice of appeal from the court's judgment of dismissal. While the appeal was pending, appellee filed a final accounting in the probate court and the probate court filed an entry which approved and settled the account of decedent karl Lierenz and discharged appellee as executrix of the estate.

In March 1991, this court reversed in part the trial court's ruling on the parties' motions. On remand, the trial court reinstated appellee's complaint and on January 15, 1992, appellants filed another motion to dismiss appellee's complaint on the ground that appellee lacked authority to maintain new litigation after having been discharged as executrix of the estate by the Probate Court. ON March 13, 1992, the trial court denied the motion.

On July 6, 1992, the matter proceeded to trial on the merits which resulted in a jury verdict in favor of appellee in the amount of $26,500. On October 8, 1992, upon appellee's motion to re-open the estate, the probate court vacated its prior order discharging her as executrix retroactive to the date of her original appointment on November 24, 1986. On October 26, 1992, the trial court denied appellee's motion for pre-judgment interest on the underlying contract and appellee filed a timely notice of appeal. On November 12, 1992, the trial court entered judgment for appellee in the amount of $26,500 and appellants filed a timely appeal.

In their sole assignment of error, appellants assert that the trial court erred in overruling their motion to dismiss appellee's complaint. Appellants argue that appellee had no right to continue to represent the estate after the probate court discharged her in 1990 and that it was error for the trial court to reinstate her complaint in march 1991. Appellee responds that the October 8, 1992 order of the probate court gave her the authority to maintain her suit against appellants.

R.C. 2109.35(A) - (D) provides that "the order of the probate court upon the settlement of a fiduciary's account shall have the effect of a judgment" and sets forth only four exceptions under which such an order may be vacated. Those exceptions provide in part:

"A. *** for fraud ***;

"B *** for good cause shown, other than fraud, upon motion of any person affected by the order

who was not a party to the proceeding in which the order was made *** and who had no knowledge of the proceeding in time to appear in it;

"C. *** for good cause shown, other than fraud, upon motion of any person affected by the order who was a party to the proceeding in which the order was made solely by reason of his having been served by publication ***;

"D. *** for good cause shown upon motion of the fiduciary, if the motion is filed prior to the settlement of the account showing that the fiduciary has fully discharged his trust ***."

Upon consideration of the foregoing, this court finds that 1) where the final accounting in a decedent's estate has been filed and approved, the order of settlement has the effect of a judgment and can be vacated only in the manner set forth in R.C. 2109.35. In Re Reitler (1956), 73 Ohio Law Abs. 328, 137 N.E.2d 791; 2) the probate court's order approving and settling the account of Karl Lierenz in March 1990 had the effect of a final judgment and, thereafter, Janet Lierenz was no longer the executrix of the estate and died not have the authority to maintain an action on behalf of the estate; and 3) the March 13, 1992 denial of appellant's motion to dismiss was contrary to law and error and appellants' sole assignment of error is found well-taken.

Having found appellants' assignment of error well-taken, we find appellee's cross-assignment of error

appealing the denial of her motion for pre-judgment interest moot and not well-taken.

On consideration whereof, this court finds that substantial justice was not done the party complaining and the judgment of the Erie County Court of Common Pleas is reversed. Costs of this appeal are assessed to appellee.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/80.

/s/ Peter M. Handwork, J.

/s/ Charles D. Abood, P.J.
CONCUR

Melvin L. Resnick, J., dissents.

## DISSENTING OPINION

RESNICK, M.L., J. I respectfully dissent. The majority decision focuses on the alleged reappointment of appellee as the personal representative of the estate of Karl Lierenz and the effect of R.C. 2109.35. The majority suggests that approval of the final account and the discharge of appellee precludes the prosecution of the claim against appellants.

First, there is no evidence in the record of this case to support the conclusion that appellee was ever reappointed as executrix of the Lierenz estate. Consequently, this argument should be disregarded. More importantly, settlement and distribution orders rendered by the probate court do not bar the contract claim. In approving a final account, the probate court determines only the correctness of the account. In Re Butler's Estate (1940), 137 Ohio St. 115, 117. Persons with whom the personal representative has dealings during the administration of the estate are not parties to the accounting proceeding. Id. Accordingly, settlement of an account and the discharge of a personal representative does not bar the subsequent prosecution of a chose in action which was an asset of a decedent's estate and which does not involve the issue determined by the probate court. That is, the doctrine of res judicata does not preclude an action by the legatee after distribution. See Whitehead v. Gen'l Tel. Co. (1969), 20 Ohio St. 2d 108.

The motion to dismiss filed by appellants was based, in essence, on Civ.R. 17(A) in that appellants asserted that the action against them was not being prosecuted by the real party in interest. In such instances, immediate dismissal is not the preferred remedy. Rather, a reasonable time for ratification, joinder or substitution of the real party in interest must be allowed. Civ.R. 17(A). Civ.R. 1(B) provides that the civil rules "shall be construed to and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." In this case, lengthy proceedings, including two appeals and a jury trial have

already occurred. Thus, while the trial court did err in permitting this cause of action to go forward in the name of the executrix, I believe that this cause should be reversed and remanded for further proceedings pursuant to Civ.R. 17(A).

---

IN THE COURT OF APPEALS
SIXTH JUDICIAL DISTRICT OF OHIO
ERIE COUNTY

Case No. E-92-71

JANET LIERENZ, EXECUTRIX,
APPELLANT

vs.

MAX BOWEN, ET AL.,
APPELLEE

---

NOTICE OF APPEAL TO THE
OHIO SUPREME COURT

---

J. Michael Goldberg
(0046685)
75 Public Square
Suite 1020
Cleveland, OH 44113
(216) 621-1375

Peggy E. Goldner
(0042299)
458 Leader Building
Cleveland, OH 44114
(216) 696-3900

Attorneys for Appellant

John F. Kirwan
189 E. Market Street
Sandusky, OH 44870
(419) 626-1917

Attorney for Appellee

*APPENDIX B-1*

IN THE SIXTH DISTRICT COURT APPEALS
ERIE COUNTY, OHIO

| | | |
|---|---|---|
| JANET LIERENZ, EXECUTRIX | ) | Ct. App. No. E-92-71 |
| APPELLANT, | ) | |
| vs. | ) | NOTICE OF APPEAL TO THE OHIO SUPREME COURT |
| MAX BOWEN, ET AL., | ) | |
| APPELLEE. | ) | |

Notice is hereby given that the Appellant, JANET LIERENZ, EXECUTRIX OF THE ESTATE OF KARL LIERENZ, by and through counsel, hereby appeals to the Ohio Supreme Court from the final judgment entered in this action by the Court of Appeals, Sixth Appellate District, on the 14th day of January, 1994. The case involves a substantial constitutional question.

Respectfully submitted,


PEGGY E. GOLDNER
(0042299)
The Leader Building
Suite 458
Cleveland, OH 44114
(216) 696-3900

/s/ J. Michael Goldberg
(0046685)
75 Public Square
Suite 1020
Cleveland, Ohio 44113
(216) 621-1375

Attorneys for Janet Lierenz, APPELLANT


*APPENDIX B-2*

CERTIFICATE OF SERVICE

A copy of the foregoing *Notice* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this _____ day of February, 1994.

/s/ J. Michael Goldberg

---

**IN THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| JANET LIERENZ, Executrix, | } | |
| | } | On Appeal from the |
| Appellant, | } | Erie County Court of |
| | } | Appeals, Sixth |
| vs. | } | Appellate District |
| | } | |
| | } | |
| MAX BOWEN, *et al.*, | } | Court of Appeals |
| | } | Case No. E-92-71 |
| Appellees. | } | |

---

**MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION**

---


J. Michael Goldberg
(0046685)
75 Public Square
Suite 1020
Cleveland, OH 44113
(216) 621-1375

PEGGY E. GOLDNER
(0042299)
The Leader Building
Suite 458
Cleveland, OH 44114
(216) 696-3900

Attorneys for Appellant

JOHN F. KIRWAN
189 E. Market Street
Sandusky, OH 44870
(419) 626-1917

Attorney for Appellee

## MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION

Now comes the Appellant, JANET LIERENZ, EXECUTRIX OF THE ESTATE OF KARL LIERENZ, by and through the undersigned counsel, and respectfully moves this Honorable Court grant Appellant an extension of forty-five (45) days within which to file her *Memorandum In Support of Supreme Court Jurisdiction.* Said *Memorandum* currently is due on 7 March 1994. The grounds for this Motion are more fully stated in the Affidavit attached hereto and incorporated herein by reference.

Respectfully submitted,


Peggy E. Goldner (0042299)
The Leader Building
Suite 458
Cleveland, OH 44114
(216) 696-3900

J. Michael Goldberg (0046685)
75 Public Square
Suite 1020
Cleveland, Ohio 44113
(216) 621-1375

Attorneys for Janet Lierenz, APPELLANT


## CERTIFICATE OF SERVICE

A copy of the foregoing *Motion* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this 4th day of March, 1994.

J. Michael Goldberg
Peggy E. Goldner

*APPENDIX C-2*

STATE OF OHIO }
COUNTY OF CUYAHOGA } SS.

**IN THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| JANET LIERENZ, Executrix, Appellant, | } | On Appeal from the Erie County Court of Appeals, Sixth Appellate District |
| vs. | } | |
| MAX BOWEN, *et al.*, Appellees. | } | Court of Appeals Case No. E-92-71 |

---

**AFFIDAVIT OF J. MICHAEL GOLDBERG**

---

Affiant, J. MICHAEL GOLDBERG, being first duly sworn according to law, deposes and says:

1. Affiant is a licensed attorney duly admitted to the practice of law in Ohio.

2. Affiant represents the Appellant, Janet Lierenz, whose *Memorandum In Support of Supreme Court Jurisdiction* is due for filing on 7 March 1994, pursuant to S. Ct. Prac. R. II, Section 5.

3. Affiant has substantially completed the research necessary to prepare said *Memorandum*; however, because of his unusually heavy trial and deposition schedule during the months of February and

March, Affiant has been unable to complete said *Memorandum* in time for filing on March 7th.

4. On 7 February 1994, Affiant caused the *Notice of Appeal to the Ohio Supreme Court* to be filed in the Sixth District Court of Appeals at Erie County. From Wednesday 9 February through Monday 14 February 1994, Affiant was engaged in trial in the case styled Apel, *et al.* v. Katz, *et al.*, Cuyahoga County Common Pleas Case No. 174255, before the Honorable Timothy J. McGinty. Subsequently, Affiant was involved in full day depositions on the following dates: Thursday 17 February and Friday 18 February (Chandler, *et al.* v. Society Corporation, *et al*, United States District Court Case No. 1:93 CV 2352); Friday 25 February (Telephone Communications, Inc. v. David R. Gordon, *et al.*, Cuyahoga County Common Pleas Case No. 251439); and Thursday 3 March (Bybee v. Lorain Correctional Institution, *et al.*, United States District Court Case No. 1:93 CV 1768).

5. Within the next two (2) weeks, Affiant must prepare and file at an Appellate Brief in the Eighth District Court of Appeals (Jennings v. Ameritrust Company, *et al.*) and two (2) post-trial motions regarding Apel v. Katz, *supra.*

6. Within the next three (3) weeks, Affiant must prepare for and take at least seven (7) depositions in the Chandler case, *supra*, as well as prepare for trial, which currently is scheduled for 11 April 1994.

7. Affiant therefore requests that this Honorable Court grant him forty-five (45) days from 7

March 1994 within which to prepare and file the *Memorandum In Support of Supreme Court Jurisdiction* on behalf of the Appellant.

8. Affiant respectfully asserts that good cause exists for the granting of this Motion, and that such is not interposed for the purpose of delay.

FURTHER AFFIANT SAYETH NAUGHT.

/S/ J. Michael Goldberg

SWORN TO BEFORE ME, and subscribed in my presence on this 4th day of March, 1994.

/s/
Gary A. Kazdin-Attorney
My commission does not expire.

---

**IN THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| JANET LIERENZ, Executrix, Appellant, | } | On Appeal from the Erie County Court of Appeals, Sixth Appellate District |
| vs. | } | |
| MAX BOWEN, *et al.*, Appellees. | } | Court of Appeals Case No. E-92-71 |

---

**SECOND MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION**

---


J. Michael Goldberg
(0046685)
75 Public Square
Suite 1020
Cleveland, OH 44113
(216) 621-1375

PEGGY E. GOLDNER
(0042299)
458 Leader Building
Cleveland, OH 44114
(216) 696-3900

Attorneys for Appellant

JOHN F. KIRWAN
189 E. Market Street
Sandusky, OH 44870
(419) 626-1917

Attorney for Appellee

## MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION

Now comes the Appellant, JANET LIERENZ, EXECUTRIX OF THE ESTATE OF KARL LIERENZ, by and through the undersigned counsel, and respectfully moves this Honorable Court grant Appellant an extension of fourteen (14) days within which to file her *Memorandum In Support of Supreme Court Jurisdiction.* Said *Memorandum* currently is due on 15 April 1994. The grounds for this Motion are more fully stated in the Affidavit attached hereto and incorporated herein by reference.

Respectfully submitted,


Peggy E. Goldner (0042299)
458 Leader Building
Cleveland, OH 44114
(216) 696-3900

J. Michael Goldberg (0046685)
75 Public Square
Suite 1020
Cleveland, Ohio 44113
(216) 621-1375

Attorneys for Janet Lierenz, APPELLANT


## CERTIFICATE OF SERVICE

A copy of the foregoing *Motion* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this 15th day of April 1994.

J. Michael Goldberg
Peggy E. Goldner

STATE OF OHIO }
COUNTY OF CUYAHOGA } SS.

**IN THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| JANET LIERENZ, Executrix, Appellant, | } | On Appeal from the Erie County Court of Appeals, Sixth Appellate District |
| vs. | } | |
| MAX BOWEN, *et al.*, Appellees. | } | Court of Appeals Case No. E-92-71 |

---

**AFFIDAVIT OF J. MICHAEL GOLDBERG**

---

Affiant, J. MICHAEL GOLDBERG, being first duly sworn according to law, deposes and says:

1. Affiant is a licensed attorney duly admitted to the practice of law in Ohio.

2. Affiant represents the Appellant, Janet Lierenz, whose *Memorandum In Support of Supreme Court Jurisdiction* is due for filing on 15 April 1994, pursuant to S. Ct. Prac. R. II, Section 5.

3. Affiant has substantially completed the research necessary to prepare said *Memorandum*; however, Affiant has been unable to complete said *Memorandum* in time for filing on April 15th.

4. Affiant expects to be in Louisville, Kentucky from Tuesday April 19th through Saturday April 23rd and will not be able to complete the *Memorandum* during this time.

5. Affiant requests that this Honorable Court grant Appellant a second extension of fourteen (14) days, or until 29 April 1994, to file the *Memorandum In Support of Supreme Court Jurisdiction* on behalf of the Appellant.

6. Affiant respectfully asserts that good cause exists for the granting of this Motion, and that such is not interposed for the purpose of delay.

FURTHER AFFIANT SAYETH NAUGHT.

/S/ J. Michael Goldberg

SWORN TO BEFORE ME, and subscribed in my presence on this 15th day of April 1994.

/s/
Gary A. Kazdin-Attorney
My commission does not expire.

---

## THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| Janet Lierenz, Executrix, Appellant, | } | 1994 TERM |
| | } | To wit: April 18, 1994 |
| v. | } | |
| | } | Case No. 94-0510 |
| Max Bowen, et al., Appellees. | } | E N T R Y |

On written request of appellant for an extension of time to file a memorandum in support of jurisdiction, it is ordered by the Court that, good cause not having been given for an extension, the request is denied.

/s/ THOMAS J. MOYER, C.J.

## IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| JANET LIERENZ, Executrix, Appellant, | } | On Appeal from the Erie County Court of Appeals, Sixth Appellate District |
| vs. | } | |
| MAX BOWEN, *et al.*, Appellees. | } | Court of Appeals Case No. E-92-71 |

---

## MOTION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION INSTANTER

---


J. Michael Goldberg
(0046685)
75 Public Square
Suite 1020
Cleveland, OH 44113
(216) 621-1375

PEGGY E. GOLDNER
(0042299)
458 Leader Building
Cleveland, OH 44114
(216) 696-3900

Attorneys for Appellant

JOHN F. KIRWAN
189 E. Market Street
Sandusky, OH 44870
(419) 626-1917

Attorney for Appellee

## MOTION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION INSTANTER

Now comes the Appellant, JANET LIERENZ, EXECUTRIX OF THE ESTATE OF KARL LIERENZ, by and through the undersigned counsel, and respectfully moves this Honorable Court grant Appellant leave to file her *Memorandum In Support of Supreme Court Jurisdiction* instanter. The grounds for this Motion are more fully stated in the Affidavit attached hereto and incorporated herein by reference.

Respectfully submitted,


Peggy E. Goldner (0042299)
458 Leader Building
Cleveland, OH 44114
(216) 696-3900

J. Michael Goldberg (0046685)
75 Public Square
Suite 1020
Cleveland, Ohio 44113
(216) 621-1375

Attorneys for Janet Lierenz, APPELLANT


## CERTIFICATE OF SERVICE

A copy of the foregoing *Motion* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this 15th day of April 1994.

J. Michael Goldberg
Peggy E. Goldner

STATE OF OHIO }
COUNTY OF CUYAHOGA } SS.

**IN THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| JANET LIERENZ, Executrix, Appellant, | } | On Appeal from the Erie County Court of Appeals, Sixth Appellate District |
| vs. | } | |
| MAX BOWEN, *et al.*, Appellees. | } | Court of Appeals Case No. E-92-71 |

## AFFIDAVIT OF J. MICHAEL GOLDBERG

Affiant, J. MICHAEL GOLDBERG, being first duly sworn according to law, deposes and says:

1. Affiant is a licensed attorney duly admitted to the practice of law in Ohio.

2. Affiant represents the Appellant, Janet Lierenz, whose *Memorandum In Support of Supreme Court Jurisdiction* was due for filing on 15 April 1994, pursuant to S. Ct. Prac. R. II, Section 5.

3. On April 15th, Affiant filed a motion requesting a fourteen (14) day extension to file said *Memorandum*, indicating in the supporting Affidavit that he would be out of the State during the week of April 18th.

4. In the motion for extension, Affiant neglected to inform this Court that he was in Columbus

from Tuesday April 12th through Thursday April 14 and was therefore unable to complete the *Memorandum.*

5. Affiant was in Louisville, Kentucky from Tuesday April 19th through Saturday April 23rd.

6. On April 22nd, Affiant called his office from Louisville and was informed that the motion for extension had been denied.

7. Affiant returned to Cleveland on Sunday April 24th and rearranged his Monday schedule in order to complete and forward the *Memorandum* for filing on Tuesday April 26th.

8. Affiant respectfully requests this Honorable Court grant Appellant leave to file the *Memorandum In Support of Supreme Court Jurisdiction* instanter.

9. Affiant respectfully asserts that good cause exists for the granting of this Motion, and that Appellee will not be prejudiced by the granting of same.

FURTHER AFFIANT SAYETH NAUGHT.

/S/ J. Michael Goldberg

SWORN TO BEFORE ME, and subscribed in my presence on this 25th day of April 1994.

/s/
Gary A. Kazdin-Attorney
My commission does not expire.

*APPENDIX F-4*

**IN THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| JANET LIERENZ, Executrix, | } | |
| | } | On Appeal from the |
| Appellant, | } | Erie County Court of |
| | } | Appeals, Sixth |
| vs. | } | Appellate District |
| | } | |
| | } | |
| MAX BOWEN, *et al.*, | } | Court of Appeals |
| | } | Case No. E-92-71 |
| Appellees. | } | |

---

**MEMORANDUM IN SUPPORT OF SUPREME COURT JURISDICTION**

---


J. Michael Goldberg
(0046685)
75 Public Square
Suite 1020
Cleveland, OH 44113
(216) 621-1375

PEGGY E. GOLDNER
(0042299)
The Leader Building
Suite 458
Cleveland, OH 44114
(216) 696-3900

Attorneys for Appellant

JOHN F. KIRWAN
189 E. Market Street
Sandusky, OH 44870
(419) 626-1917

Attorney for Appellee

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*PROPOSITION OF LAW NO. 3:*

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**DUTY TO CURE THE DEFECT AT THE TRIAL COURT LEVEL. . . . . 3**

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**UNDER R.C. § 2309.59, A COURT OF APPEALS SHALL DISREGARD ANY PLEADING ERROR OR DEFECT WHICH DOES NOT AFFECT THE SUBSTANTIAL RIGHTS OF THE ADVERSE PARTY. NO FINAL JUDGMENT OR DECREE SHALL BE REVERSED OR AFFECTED BY REASON OF SUCH ERROR OR DEFECT. . . . . 10**

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**A COURT OF APPEALS DEPRIVES THE NON-APPEALING PARTY OF HER RIGHT TO TRIAL BY JURY WHEN IT REVERSES JUDGMENT ON THE JURY'S VERDICT AND ORDERS THE DISMISSAL OF THE NON-APPEALING PARTY'S CAUSE OF ACTION BECAUSE OF A PURELY TECHNICAL PLEADING DEFECT. O. CONST. ART. I, § 5. . . . 14**

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R.C. § 2309.59 . . . . . 10, 12
U.S. Const. Amend. XIV, Section 1 . . . . . 7

RULES

Civ. R. 1(B) . . . . . 9
Civ. R. 17(A) . . . . . 5, 6
Civ. R. 17(A) [Staff Note] . . . . . 5

## STATEMENT OF THE CASE

On April 5, 1988, Plaintiff/Appellant, Janet Lierenz, in her capacity as Executrix of the estate of Karl Lierenz, filed a complaint against the Defendants/Appellees. On May 9, 1989, Appellant filed a motion to dismiss Appellees' counterclaim. On November 22, 1989, Appellees filed their motion for summary judgment. On February 26, 1990, the lower court granted both motions and dismissed the action.

On March 27, 1990, Appellant filed her timely notice of appeal. Appellees filed no notice of appeal.

While the said appeal was pending, Appellant filed what purported to be a final account in Probate Court, Huron County. Upon said filing, the Probate Court filed an Entry Approving and Settling The Account relating to the estate of Karl Lierenz.

One year later, on March 22, 1991, the court of appeals reversed **in part** the trial court's ruling on the parties' respective motions. The appellate court reinstated Appellant's complaint. The Court did *not* revive the counterclaim because Appellees had not appealed its dismissal.

On January 15, 1992, Appellees filed another motion to dismiss the complaint on the ground that Appellant lacked authority to maintain new litigation. The lower court properly denied said motion.

On July 6, 1992, the matter proceeded to trial on the merits. Although the Appellees' counterclaim had

not been reinstated, the counterclaim was tried as well. Appellant prevailed on both the complaint and counterclaim, and judgment was subsequently entered on the verdict.

On October 8, 1992, upon application to reopen estate, the Probate Court of Huron County vacated its prior order discharging Janet Lierenz of her trust as Executrix of the estate of Karl Lierenz. Said judgment provided that her appointment as the fiduciary of Karl Lierenz's estate is effective retroactive to the date of her original appointment of November 24, 1986; further, said appointment shall continue thereafter until discharged by further order of the probate court.

Subsequent to this judgment, Appellees filed their notice of appeal, assigning as the sole error the lower court's denial of their motion to dismiss the complaint because of Appellant's supposed lack of authority to maintain the within litigation. Of course, by the time the notice of appeal was filed, the issue was already moot.

Appellant also filed a notice of cross-appeal, assigning as error the trial court's denial of her motion for prejudgment interest on the underlying contract.

STATEMENT OF THE FACTS (REGARDING PREJUDGMENT INT

Appellant, Janet Lierenz, is and was the Executrix of the estate of her husband, Karl R. Lierenz. Mr. Lierenz, hereinafter referred to as Plaintiff's Decedent, had been engaged in the building construction industry.

On or about July 27, 1985, Mr. Lierenz entered into a contract with Max Bowen, Regan Lutzko, and Robert Hill, partners doing business as "Crown Motel." According to the parties' agreement, Mr. Lierenz would build an addition onto the Crown Motel restaurant, and the Defendants (Appellees) would pay Mr. Lierenz, d/b/a South Side Construction, the sum of $27,000.00 payable as follows: 50 percent of said sum upon delivery of materials; remainder upon completion of the project.

According to the testimony and evidence presented at trial, materials for the Crown Motel project were delivered as early as August 8, 1985. On November 6, 1985, Mr. Lierenz began actual construction of the Crown Motel addition.

At the insistence of the Appellees, Mr. Lierenz completed construction of the addition in December 1985 – in time for the Defendants to book various Christmas parties. In constructing this addition, Mr. Lierenz incurred out-of-pocket expenses of $22,844.11. The total amount of these expenses, which were incurred in materials and labor for the Crown Motel project, were paid in full by Mr. Lierenz. Defendants **never** reimbursed Mr. Lierenz for these expenses.

## ARGUMENT

*PROPOSITION OF LAW NO. 1:*

**A COURT OF APPEALS DEPRIVES A PARTY OF HER RIGHT TO DUE PROCESS UNDER THE DUE PROCESS**

**CLAUSE OF U.S. CONST. AMEND. XIV, SECTION 1, AND THE DUE COURSE OF LAW PROVISION OF O. CONST. ART. I, SECTION 16, WHEN IT ORDERS THE DISMISSAL OF THE NON-APPEALING PARTY'S CAUSE OF ACTION BECAUSE OF A TECHNICAL DEFECT IN THE COMPLAINT, WHERE THE NON-APPEALING PARTY WAS UNDER NO DUTY TO CURE THE DEFECT AT THE TRIAL COURT LEVEL.**

The Sixth District Court of Appeals reversed the trial court's judgment on the verdict, finding that Janet Lierenz, Plaintiff-Appellant herein, did not have authority to maintain the instant action as the representative of her deceased husband's estate. [Opinion, p. 5] The appellate court's decision apparently rests upon an implicit finding that Appellant was not a "real party in interest."

The appellate court's decision is an aberration; it purports to determine whether Janet Lierenz had authority to maintain the litigation in the instant civil action (maintained in Erie County C.P.) by analyzing and reviewing the proceedings *in the Huron County Probate Court*! The Sixth District completely disregards Appellant's substantive rights and effectively invades the Appellant's right to trial by jury.

A. A COURT OF APPEALS MAY NOT ORDER DISMISSAL OF THE NON-APPEALING PARTY'S CAUSE OF ACTION FOR FAILURE TO

PROSECUTE THE ACTION IN THE NAME OF THE REAL PARTY IN INTEREST, WHERE SUCH PARTY WAS NOT GIVEN A REASONABLE OPPORTUNITY TO SUBSTITUTE THE REAL PARTY IN INTEREST. CIV. R. 17(A).

The Sixth District Court of Appeals held that the trial court should have dismissed Appellant's claim because she was not the real party in interest. This holding clearly is erroneous. Civ. R. 17(A) specifically provides, in relevant part;

> * * * ***No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.*** Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. (emphasis added)

The Staff Note to Civ. R. 17(A) provides, in relevant part:

> The fourth sentence of Rule 17(A) is borrowed directly from a 1966 amendment of Federal Rule 17(a). ***Assume that an administrator under a void appointment sues in good faith. Under Rule 17(A) the action is not dismissed; instead a reasonable time is permitted until***

> ***the proper administrator can be substituted in order that justice might be done.*** The 1966 amendment of Federal rule 17(a) "codifies" the principle enunciated in *Levinson v. Deupree*, 345 U.S. 648 (1953) and *Link Aviation, Inc. v. downs*, 325 F.2d 613 (D.D.C. 1963). * * * Rule 17(A) simply states clearly that a proper real party in interest may be substituted without the actions being dismissed. (emphasis added)

In the case at bar, both the trial court and the Appellant believed that the Janet Lierenz was the duly appointed executrix of the estate of her husband, Karl Lierenz. Had the trial court found that Mrs. Lierenz were acting under a void appointment, then presumably it would have given her a reasonable opportunity to substitute the name of the real party in interest, as required by Civ. R. 17(A). However, the trial court found Appellee's motion to dismiss not well-taken and denied same[1].

---

[1] The trial court's ruling on Appellee's motion to dismiss was proper. A "real party in interest" is one who has a real interest in the subject matter of the litigation and who would be entitled to damages. Wests Clermont Educ. Assoc. v. Bd. of Educ. (1980), 67 Ohio App. 2d 160

Appellant, Janet Lierenz, was both the executrix of her husband's estate *and* the sole legatee under her husband's will. Either way, Janet Lierenz would have been entitled to maintain her deceased husband's chose in action.

The Court of Appeals held that Appellee's motion to dismiss should have been granted at the trial court level. This holding clearly was wrong in view of the requirements of Civ. R. 17(A). Moreover, the Court of Appeals' action denied Mrs. Lierenz, the non-moving party, a reasonable opportunity to cure the pleading defect. Mrs. Lierenz received her first and *only* notice, that the real party in interest must be substituted, when the Court of Appeals issued its opinion.

Reasonable notice and hearing are the cornerstones of due process. The Fourteenth Amendment of the United States Constitution provides: "* * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, Section 1. Similarly, Article I, Section 16 of the Ohio Constitution provides:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

O. Const. Art. I, Section 16 [Redress in Courts].

The action taken by the Court of Appeals denies Mrs. Lierenz *any* opportunity to cure a technical defect in pleading -- an opportunity she would have had available at the trial court level. Moreover, the appellate court's action effectively makes pleading a game of skill "in which one misstep by counsel may be decisive to the outcome." Hardesty v. Cabotage (*Per*

*curiam* 1982), 1 Ohio St. 3d 114, 117 ("Decisions on the merits should not be avoided on the basis of mere technicalities; pleading is not 'a game of skill in which one misstep by counsel may be decisive to the outcome. . . .")

In Vance v. Davis (1923), 107 Ohio St. 577, the Court held that the parties to a cause are determined from the entire record, not solely by the caption in the particular cause. *Id.*, ¶1, Syllabus by the Court. The Court stated:

> It would be trifling with law and justice to hold that the title of a cause determined its character or nature, or alone determined who were the parties to the cause. The record of the court's proceedings determines who the parties rightfully and legally are, and not the caption on the pleadings.

*Id.* at 580.

In the case at bar, the pleading defect found by the appellate court is as tenuous as a defect found in a caption. While the court makes much of the fact that Janet Lierenz was acting under a void appointment of executorship, the court completely ignores the fact that, whether the action is maintained in the name of the estate representative or her name individually, *in either event*, Janet Lierenz -- and no one else -- is the *sole* beneficiary. This information may be found in the trial court record in documents *submitted by Appellees.*

Civ. R. 1(B) states: "These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." This Court has held several times, that:

> The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies. Civ. R. 1(B) requires that the Civil Rules shall be applied "to effect just results." Pleadings are simply an end to that objective.

Peterson v. Teodosio (1973), 34 Ohio St. 2d 161, 175. "Justice abhors the loss of causes of action by pure technicalities." Bell v. Coen (1975), 48 Ohio App. 2d 325, 327. If the appellate court's decision is allowed to stand, then Janet Lierenz will have lost her substantive cause of action by virtue of a curable pleading technicality which she had no opportunity to cure.

B. NO PERSON SHOULD BE DENIED THE ASSERTION OF A CAUSE OF ACTION ON CAPTIOUS OR PURELY TECHNICAL GROUNDS. R.C. § 1.11

The court's action violates spirit and intent of the Civil Rules and the rule of construction in R.C. § 1.11, which provides:

> Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.

The law is well settled: "All statutes relating to procedure are remedial in their nature and should be liberally construed and applied to effect their respective purposes." The Wellston Iron furnace Co. v. Rinehart, Admr. (1923), 108 Ohio St. 117, ¶1, Syllabus by the Court. Recognizing that strict rules of pleading may be used to impose unnecessary burdens on rights of recovery, this Court has further held that "no person should be denied the assertion of a cause of action on captious or purely technical grounds." Porter v. Fenner (1966), 5 Ohio St. 2d 233, ¶1, Syllabus by the Court.

In the case at bar, the appellate court has misapplied a rule of pleading (Civ. R. 17(A)), effectively destroying Janet Lierenz' substantive right to redress. Moreover, the appellate court completely disregarded the mandate of R.C. § 2309.59.

*PROPOSITION OF LAW NO. 2:*

**UNDER R.C. § 2309.59, A COURT OF APPEALS SHALL DISREGARD ANY PLEADING ERROR OR DEFECT WHICH DOES NOT AFFECT THE SUBSTANTIAL RIGHTS OF THE ADVERSE PARTY. NO FINAL JUDGMENT OR DECREE SHALL BE REVERSED OR AFFECTED BY REASON OF SUCH ERROR OR DEFECT.**

R.C. § 2309.59 provides, in relevant part:

In every stage of an action, the court shall disregard any error or defect in the pleadings or proceedings which does not affect the substantial

rights of the adverse party. No final judgment or rights or decree shall be reversed or affected by reason of such error or defect.

Nowhere -- neither at the trial court nor appellate court levels -- did Appellees even *claim* prejudice, much less demonstrate it. At no time ever did Appellees even *mention* that the alleged defect in pleading affected any substantial right. The appellate court failed in every respect to do substantial justice in this case.

The Ohio Supreme Court has previously addressed the situation where an action has been dismissed on the merits for a pleading deficiency. In Taylor v. Scott (1959), 168 Ohio St. 391, ¶2, Syllabus the Court held:

> Where a minor commences an action under Section 3111.01, Revised Code, and no attack is made upon her capacity to sue until after a verdict is rendered finding the defendant guilty, ***the trial court has the power under Section 2309.58, Revised Code, to permit the minor to amend her complaint to show her minority by adding the affidavit of her mother, as next friend, to the complaint and to conform the complaint and proceedings to the facts proved when the amendment does not substantially change the claim, and the failure to do so constitutes error.***) (emphasis added)

In the case at bar, the claimed error was one of form rather than substance. Whether Appellant

proceeded personally or in her capacity as executrix in no way altered the nature of the claim against the Appellees.

Ironically, the Sixth District Court of Appeals recognized the distinction between defects in form and defects in substance. In King v. New York, Chicago & St. Louis Rd. Co. (Lucas Co. 1966), 6 Ohio App. 2d 123, the court was faced with the issue of whether an amendment related back to the time of the filing of the original complaint. The court found that "* * * the change was in form rather than in substance. * * * It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit." *Id.* at 132. The court found further that "[T]he basis of this lawsuit, its essential facts, and its final object remain the same throughout all these proceedings." *Id.* at 131.

The appellate court failed to follow the clear and unambiguous mandate of R.C. § 2309.59. R.C. § 2309.59 defines both the appellate court's and this Court's duty:

> * * * If the reviewing court determines and certifies that, in its opinion, substantial justice has not been done to the party complaining as shown by the record, such court shall reverse the final judgment or decree and render, or remand the case to the lower court with instructions to render, the final judgment or decree that should have been rendered.

*Id.* Accordingly, this Honorable Court should reverse the appellate court's decision.

*PROPOSITION OF LAW NO. 3:*

**A COURT OF APPEALS DEPRIVES THE NON-APPEALING PARTY OF HER RIGHT TO TRIAL BY JURY WHEN IT REVERSES JUDGMENT ON THE JURY'S VERDICT AND ORDERS THE DISMISSAL OF THE NON-APPEALING PARTY'S CAUSE OF ACTION BECAUSE OF A PURELY TECHNICAL PLEADING DEFECT. O. CONST. ART. I, § 5.**

The within case was tried before a jury which rendered a unanimous verdict in favor of Appellant. The trial court entered judgment on the verdict, and Appellees appealed, claiming essentially that Janet Lierenz was not the real party in interest. The appellate court sustained Appellee's assignment of error and reversed, holding that the original complaint should have been dismissed.

In Gibbs v. Girard (1913), 88 Ohio St. 34, the Court held:

> The right of trial by jury, being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated by either legislative act or judicial order or decree.

*Id.*, ¶2, Syllabus by the Court. The law is well-settled that granting a directed verdict violates a party's right

of trial by jury when there exists some evidence tending to prove material facts. A party's right of trial by jury is no less violated when a court -- especially a court of appeals -- reverses a judgment on a jury's verdict because of a curable technical pleading defect.

*PROPOSITION OF LAW NO. 4:*

**WHERE THE AMOUNT OWING UNDER A CONTRACT IS CAPABLE OF ASCERTAINMENT BY MERE COMPUTATION OR IS SUBJECT TO REASONABLY CERTAIN CALCULATIONS, INTEREST RUNS ON THE DEBT FROM THE TIME IT WAS DUE, EVEN THOUGH LIABILITY FOR THE DEBT IS DISPUTED. R.C. § 1343.03(A)**

Appellant filed the instant contract case and tried it to a jury. At trial, the jury found that Plaintiff's Decedent had substantially performed the contract between the parties. The price term to which the parties had agreed was Twenty-Seven Thousand Dollars ($27,000.00). The jury found in favor of the Plaintiff for Twenty-Six Thousand Five Hundred Dollars ($26,500.00).

Appellant filed a timely motion for prejudgment interest which was denied by the trial court. On cross-appeal, Appellant assigned as error the trial court's denial of prejudgment interest. However, the Court of Appeals refused to review this assigned error, indicating that it was moot based on the court's decision regarding the Appellee's assigned error.

This case fits squarely within the parameters of R.C. § 1343.03(A) which provides, in relevant part:

> [W]hen money becomes due and payable . . . upon all verbal contracts entered into . . . the creditor is ***entitled to*** interest at the rate of ten per cent per annum, and no more, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. (emphasis added)

R.C. § 1343(A).

The law in Ohio is well-settled:

> **Where the amount owing under a contract is clear, interest runs on the debt from the time it was due, even though liability for the debt is disputed.**

Cleveland Neighborhood Health Serv., Inc. v. St. Clair Builders, Inc. (1989), 64 Ohio App. 3d 639; Tony Zumbo & Son Construction Co. v. Department of Transportation (1984), 22 Ohio App. 3d 141; Nursing Staff of Cincinnati, Inc. v. Sherman (1984), 13 Ohio App. 3d 328 ("A mere denial that one is liable for a debt that is otherwise clear and ascertainable is not sufficient to defeat a claim for prejudgment interest"). A party's entitlement to prejudgment interest turns upon a determination as to whether the underlying debt is liquidated. *Id.* "The assertion of a counterclaim does

not render a liquidated claim based on a contract unliquidated." L.A. Gross & Sons, Inc. v. Parisi (1990), 66 Ohio App. 3d 697.

"Furthermore, where money becomes due on a contract, interest accrues from the time the money should have been paid." [Citation omitted]. Allied Erecting & Dismantling Co. v. Auto Baling Co. (1990), 69 Ohio App. 3d 502, 506-507; *accord*, Braverman v. Spriggs (1980), 68 Ohio App. 2d 58. The Allied court stated:

> **"[P]rejudgment interest will not be denied where the money due is clearly based on contracts entered into by the parties.** [Citation omitted]. Neither will prejudgment interest be denied where the amount is capable of ascertainment by mere computation, or is subject to reasonably certain calculations."

*Id.* at 507; *accord*, Shaker Savings Assoc. v. Greenwood Village, Inc. (1982), 7 Ohio App. 3d 141.

In the case at bar, the parties entered into a contract. The terms of this contract were integrated and memorialized in Plaintiff's trial Exhibits A and B. At trial, counsel for the respective parties stipulated on the record that these two exhibits constituted the terms of the parties' agreement. Exhibit B provided; in relevant part:

> We hereby propose to furnish labor, materials, and equipment necessary in accordance to copy of original quotation attached to this

> contract for $27,000. Payments to be made as follows: 50 percent payment to be made when materials are delivered. Balance upon completion of job.

Clearly from the language contained in Plaintiffs Exhibit B, the contract between the parties was supported by valuable consideration. Exhibit B clearly and unambiguously states the price term as well as the mode of payment.

At trial, one of the Appellees, Regan Lutzko, admitted, and the jury found, that Plaintiff's Decedent had substantially performed his part of the bargain. Substantial completion of a contract entitles the contractor to the contract price agreed upon. Cleveland Health Serv. v. St. Clair Builders (1989), 64 Ohio App. 3d 639. In Cleveland Health Serv., the court held:

> Where the party obligated to perform under the contract makes an honest effort to do so, and there is no willful omission on its part, substantial performance is all that is required to entitle the party to payment under contract.

*Id.* at. 644.

In the case at bar, Defendant, Regan Lutzko, himself admitted that ***"The addition was done in December [1985]. . . ."*** (Record, page 83 line 18; page 74 line 17). Mr. Lutzko, testified on cross-examination:

Q Okay. And -- pardon me. Given the fact that the concrete slabbing had been placed and the footers and new walls and the roof, a substantial amount of work had been performed on this building then, correct?

A Yes.

Q Okay. He had substantially performed construction of this addition?

A Yes.

(Record, page 75 line 4)

Moreover, Mr. Lutzko, admitted on the record that Plaintiff's Decedent had performed "in good faith":

Q So you are saying that the delay caused in starting this project was your fault?

A The delay in starting it?

Q Yeah, because you didn't have the money; is that what your telling me right now? That's what it sounds like.

A Well, we did not have the money at the time this was done.

Q You said that he couldn't start because you didn't have the money; is that correct?

A That's correct.

Q Okay. And he started before, in fact, you did get the money, didn't he?

A That's correct.

Q He made a good faith effort to make good on this contract even knowing that you didn't have the money to pay him at that time; is that true?

A That's correct.

(Record, page 66 line 7).

Although Defendants admitted good faith performance by Plaintiff's Decedent, Defendants could not demonstrate good faith on their own behalves. The following testimony was elicited from Defendant, Regan Lutzko, on cross-examination:

Q And part of the terms of that contract were that you pay 50 percent upon delivery of materials, correct?

A Correct.

Q Okay. And can we agree that there was a delivery of materials for the job?

A Yes.

Q Can we also agree that you did not pay him anything?

A Yes.

(Record page 209 line 7). Joyce Gonter, South Side Construction's bookkeeper, testified that the grand total cost of material and labor was twenty-two thousand eight hundred forty-four dollars and eleven cents ($22,844.11). (Record, p. 26, l. 21). That amount was paid in full by South Side Construction. (Record, p. 26,

l. 24). Ms. Gonter requested Defendant-Appellants to pay at least one-half of this total. However, Defendants-Appellant *never paid anything;* according to Joyce Gonter:

Q You were requesting how much on the accounts receivable?
A We were asking for at least half.

Q Okay. Why half?
A To at least cover the amount of material and labor.

Q Okay. Did Regan Lutzko or Crown Motel, in fact, pay one-half?
A No, they did not.

Q But you had already expended funds to pay for these materials?
A Correct.

Q These materials were already paid for?
A Yes.

Q Was labor paid for?
A Yes.

Q Okay. Regan did not pay half of anything?
A No.

Q Did Crown pay half of anything?
A No.

Q Did anybody pay half of anything?
A No.

Q In December of 1985, did you receive any money at all for the Crown Motel Construction?
A No.

Q As to this very day, did you receive any money from the Crown Motel project?
A No.

(Record, page 10 line 3).

## CONCLUSION

For the foregoing reasons, Appellant, JANET LIERENZ, respectfully requests this Honorable Court accept the instant case for review.

/S/_____
J. Michael Goldberg
Peggy E. Goldner

## CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Supreme Court Jurisdiction* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this 25th day of April, 1994.

/S/_____
J. Michael Goldberg

## APPENDIX

Notice of Appeal to the Supreme Court
Assignments of Error Filed in the Court of Appeals
Opinion of the Court of Appeals
Journal Entry of the Court of Appeals
Journal Entry from the Court of Common Pleas
R.C. § 1.11
R.C. § 1343.03(A)
R.C. § 2309.59
Civ. R. 17(A)

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**IN THE SUPREME COURT OF OHIO**

| | |
|---|---|
| JANET LIERENZ, Executrix, Appellant, | |
| vs. | SUP. CT. NO. 94-510 |
| MAX BOWEN, *et al.*, Appellees. | On Appeal from the Erie County Court of Appeals, Sixth Appellate District Case No. E-92-71 |

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**APPELLANT'S MOTION FOR RECONSIDERATION RE: SECOND MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION**

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J. Michael Goldberg
(0046685)
75 Public Square
Suite 1020
Cleveland, OH 44113
(216) 621-1375

PEGGY E. GOLDNER
(0042299)
The Leader Building
Suite 458
Cleveland, OH 44114
(216) 696-3900

Attorneys for Appellant

JOHN F. KIRWAN
189 E. Market Street
Sandusky, OH 44870
(419) 626-1917

Attorney for Appellee

## IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| JANET LIERENZ, Executrix, Appellant, | } | SUP. CT. NO. 94-510 |
| vs. | } | On Appeal from the Erie County Court of Appeals, Sixth Appellate District Case No. E-92-71 |
| MAX BOWEN, *et al.*, Appellees. | } | |

APPELLANT'S MOTION FOR RECONSIDERATION RE: SECOND MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION

Now comes the Appellant, JANET LIERENZ, EXECUTRIX OF THE ESTATE OF KARL LIERENZ, by and through the undersigned counsel, and respectfully moves this Honorable Court reconsider its ruling denying Appellant's second motion for extension of time to file her memorandum in support of jurisdiction.

Appellant's *Memorandum* originally was due on 7 March 1994. By that date, undersigned counsel had been involved with extensive trial preparation of the case styled Apel v. Katz, Cuyahoga C.P. 174255, as well as the trial, itself, which lasted four days. From that time until March 7th, said counsel was faced with the preparation and taking or defending of five (5) full days of depositions on three (3) different cases. Therefore, on March 7th, Appellant filed a timely motion for extension of time, requesting forty-five (45) days to file the *Memorandum*. The forty-five days would have

ended on Thursday, 21 April 1994 and presumably would have given the undersigned counsel sufficient time to complete and file the *Memorandum*. Said counsel requested forty-five (45) days because several days would be consumed either by scheduled depositions, arbitrations, preparation for trial of at least two cases, in addition to counsel's regular daily law practice. The Court granted Appellant's motion but ordered the *Memorandum* filed on April 15th instead of the 21st.

By April 15th, the undersigned counsel had substantially completed the *Memorandum* but could not have it prepared for filing by that date. Although the undersigned had gone to Columbus and Cincinnati on an urgent legal matter from April 12th to April 14th, he believed that the *Memorandum* could be completed by April 14th and forwarded to this Honorable Court by Federal Express by April 15th. Unfortunately, the undersigned was not able completely to finish the *Memorandum*; this problem was compounded by the undersigned's problems with a certain copier machine, which on April 13th had been specially ordered from OBM (Ohio Business Machines) for April 14th. Therefore, on April 14th, counsel for Appellant filed by facsimile a second motion for extension of time, requesting fourteen (14) days to complete and file the *Memorandum*. Fourteen days was requested because said counsel was scheduled to be in Louisville, Kentucky from Tuesday 19 April through Sunday 24 April, on business.

On Friday 22 April, the undersigned called his office from Kentucky and learned that the Court had denied Appellant's second motion for an extension. On

Monday April 25th, counsel set aside the entire day to complete for filing the *Memorandum*. In fact, the *Memorandum* and a motion for leave to file instanter was sent to the Court via Federal Express and was received for filing the next day, April 26th.

The undersigned counsel understands the importance of completing the *Memorandum* for timely filing. Maintaining a law practice, however, requires flexibility in handling unexpected matters which arise while handling scheduled events. The undersigned counsel is a sole practitioner who started his own law practice three years ago (upon obtaining his license to practice law) and has no support staff to whom tasks may be delegated. The undersigned respectfully asks this Honorable Court to recognize the time which such a practitioner must devote daily to keep up with the demands of his clients and the practice itself.

This Honorable Court has held: "Only a flagrant, substantial disregard for the local rules of a court of appeals can justify a dismissal on procedural grounds." DeHart v. Aetna Life Insurance Co. (1982), 69 Ohio St. 2d 210, Syllabus. In DeHart, the Court stated:

> * * * [W]e hasten to emphasize -- indeed re-emphasize -- that it is a fundamental tenet of judicial review in Ohio that courts should decide cases on the merits. [citation omitted] Judicial discretion must be carefully --and cautiously -- exercised before this court will uphold an outright dismissal of a case on purely procedural grounds.

*Id.* at 192.

The instant action was tried to a jury, which after four days of trial, returned a unanimous verdict in favor of the Appellant herein. The court of appeals[2] disregarded the jury's verdict and ordered the action dismissed. By doing so, the appellate court violated Appellant's right to due process under both U.S. and Ohio constitutions.

Appellant believes that, on review, this Court will recognize the important constitutional issues presented. If the appellate court's decision is destined to stand, then Appellant respectfully asserts that it should stand on its merits – not because Appellant's attorney filed the *Memorandum* eleven days late. Appellant asks the Court to consider that the second motion for extension was filed within rule; that April 26th was the absolute earliest date the undersigned could file the *Memorandum*, having learned while out of the State that the motion for extension had been denied; and that the Appellee will have suffered no prejudice whatsoever if the Court considers the April 26th filing sufficient.

Respectfully submitted,

J. Michael Goldberg
(0046685)
75 Public Square
Suite 1020
Cleveland, Ohio 44113
(216) 621-1375
Attorney for Appellant

---

[2] Judge Melvin Resnick dissenting

CERTIFICATE OF SERVICE

A copy of the foregoing *Motion For Reconsideration* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this 29th day of April 1994.

/s/ J. Michael Goldberg

| | | |
|---|---|---|
| Janet Lierenz, Executrix, Appellant, | } | 1994 TERM |
| | } | To wit: June 8, 1994 |
| v. | } | |
| | } | Case No. 94-510 |
| Max Bowen, et al., Appellees. | } | E N T R Y |

This cause is pending before the Court on the filing of a motion for an order directing the Court of Appeals for Erie County to certify its record and as a claimed appeal as of right from said court. Upon consideration of appellant's motion for leave to file memorandum in support of jurisdiction instanter and appellant's motion to reconsider this Court's denial of extension of time (filed before June 1, 1994),

IT IS ORDERED by the Court that the motion for leave to file memorandum in support of jurisdiction instanter be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that the motion to reconsider this Court's denial of extension to [sic] time be, and the same hereby, denied.

Accordingly, it is further ordered by the Court that this cause be, and the same is hereby, dismissed.

COSTS:

Motion Fee, $40.00, paid by J. Michael Goldberg. (Court of Appeals No. E9271)

/s/ THOMAS J. MOYER, C.J.

## AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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SUPREME COURT, U.S.
FILED
NOV 18 1994
OFFICE OF THE CLERK

No. 94-617

In the
**SUPREME COURT OF THE UNITED STATES**
October Term, 1993

JANET LIERENZ,
*Petitioner,*

vs.

MAX BOWEN,
REGAN L. LUTZKO,
ROBERT J. HILL,
*Respondents*

**On Petition For A Writ Of Certiorari To The Erie County Court of Appeals of Ohio**

# RESPONDENT'S BRIEF IN OPPOSITION

John F. Kirwan
Counsel of Record

189 E. Market Street
Sandusky, Ohio 44870
(419) 626-1917
FAX (419) 621-1344
Attorney for Respondents

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No. 94-617

In the
**SUPREME COURT OF THE UNITED STATES**
October Term, 1993

JANET LIERENZ,

*Petitioner,*

vs.

MAX BOWEN,
REGAN L. LUTZKO,
ROBERT J. HILL,

*Respondents*

**On Petition For A Writ Of Certiorari To The Erie County Court of Appeals of Ohio**

## RESPONDENT'S BRIEF IN OPPOSITION

Respondents Max Bowen, Regan L. Lutzko, and Robert J. Hill respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of The Erie County Court of Appeals of Ohio, 6th Appellate District, in this case.

## OPINIONS

The opinion of The Court of Appeals for Erie County, Ohio, 6th Appellate District is unreported and appears in Petitioner's Appendix A.

## SUMMARY OF ARGUMENT

Petitioner seeks review of the decision of The Court of Appeals of Erie County, Ohio, 6th Appellate District, reversing the Trial Court's denial of a motion to Dismiss Petitioners Complaint. Petitioner asserts two issues for review:

I. That The Ohio Appellate Court's Dismissal of Petitioner's Complaint is a violation of the Due Process Clause of the 5th and 14th amendment; and

II. That its decision violates Petitioner's right to Trial by Jury.

With respect to Petitioner's first claim she contends that she was denied due process because the Appeals Court dismissed her Complaint. The uncontroverted facts show she had filed a final accounting with The Probate Court of Huron County on August 13, 1990 with the assistance of council. She was given notice of the Hearing on the final accounting, which was set for Hearing September 28, 1990 and at which The Probate Court of Huron County approved her final accounting and discharged her from her capacity as a fiduciary. That discharge, pursuant to R.C. 2109.35 had "the affect of a Judgment." Petitioner had 172 days before Trial to Move The Probate Court of Huron County to vacate its Judgment of September 28, 1990. She, at no time, from the filing of the Motion asking The Common Pleas Court of Erie County to dismiss her Complaint because of her lack of fiduciary capacity up until and through the Trial, which commenced on July 6, 1992, applied to The Huron County Probate Court to be reappointed as fiduciary assuming she could comply with one of the grounds to vacate the Court's settlement of the fiduciary's account and its affect as a Judgment pursuant to R.C. 2109.35.

Petitioner's second claim of denial of the right to Trial by Jury in light of the fact that she had no representative capacity at the time that this matter came on for Trial did not violate Petitioner's

right to Trial by Jury since she has no representative capacity in this matter.

---

## STATEMENT OF THE CASE

Petitioner, in her sole capacity as Executor of The Estate of her late husband filed a lawsuit against Respondents d/b/a Crown Motel. Respondents d/b/a Crown Motel filed Counter-Claims.

While the Complaint was pending, Petitioner's Probate Attorney filed a fiduciary's account in The Probate Court of Huron County. That account had the following statement checked as to the nature of the fiduciary's final account it provided as follows: "This is a final and distributive account, and the fiduciary asks to be discharged from her Trust upon its approval and settlement." It is to be noted that the form which was provided by The Probate Court of Huron County could have been checked by the Petitioner with any one of the following applicable sentences:

1. This is a partial account. A statement of the assets remaining in the fiduciary's hands is attached.

2. This is a final account. A statement of the assets remaining in the fiduciary's hands for distribution to the beneficiaries is attached.

3. This is a distributive account, and the fiduciary asks to be discharged from her Trust upon its approval and settlement.

Petitioner in her receipts and disbursements showed the following:

Crown Motel, Route 250 N., Milan, Ohio value of amount collected 0 value or amount $30,000.

Petitioner was notified of a Hearing September 28, 1990 at 10:00 a.m. concerning her application to approve the final and distributive account and asking to be discharged from her Trust. The Huron County Probate Court on September 28, 1990 entered the following Judgment Entry:

> The estate has been fully administered and the assets have been distributed in accordance with law and the applicable instruments governing distribution;
>
> The events have occurred after which the Court may approve and settle a final account. The account is therefore approved and settled.
>
> The fiduciary is discharged from his Trust.

In January, 1992 Respondents filed a Motion to dismiss Petitioner's Complaint on the ground that she lacked authority to maintain her lawsuit. The Trial Court denied Respondents Motion. A Trial commenced July 6, 1990, and resulted in a verdict against Respondents on July 8. Petitioner, October 8, 1992, eight and a half months after Respondents had filed their Motion placing Petitioner on Notice that they contested her representative capacity, and three months after the verdict, filed a Motion in The Probate Court of Huron County to reappoint Petitioner in her representative capacity. Petitioner failed to notify Respondents concerning her Motion to be reappointed pursuant to R.C. 2109.35(D). Respondents timely filed an Appeal to The Erie County, Ohio Court of Appeals, 6th Appellate District, on the sole assignment of error that the Trial Court erred in over-ruling their Motion to Dismiss Petitioner's Complaint. The Ohio Appellate Court found that the denial of Respondents Motion to Dismiss was contrary to law and Respondents sole assignment of error was found well taken. In essence, the Appellate Court found that The Trial Court should

have granted Respondents Motion to Dismiss.

Petitioner then filed a Memorandum in Support of Jurisdiction to The Ohio Supreme Court alleging violation of her right to due process and her right to Trial by Jury. The Ohio Supreme Court refused Petitioner's request to accept jurisdiction.

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## REASONS FOR DENYING THE PETITION

Petitioner asserts that The Erie County Court of Appeals of Ohio deprived Petitioner of her chose in action when it dismissed her case, without any notice that her case was subject to dismissal.

### I. THE COURT OF APPEALS ACTED IN ACCORDANCE WITH APPLICABLE LAW ON RESPONDENTS MOTION TO DISMISS.

#### A. Petitioner voluntarily, knowingly and intelligently waived her chose in action.

Where Petitioner voluntarily, knowingly, and intelligently waived a known property right to sue in her representative capacity it is not a denial of a person's right to due process under the 5th and 14th amendments of The U.S. Constitution, or The Ohio Constitution if a Court subsequently dismisses her Complaint after she has voluntarily, knowingly, and intelligently waived her property right.

Appellant contends that she was denied due process because The Appeals Court dismissed her Complaint. Petitioner filed the final accounting with The Probate Court of Huron County on August 13, 1990 with the assistance of counsel. She was given notice of the Hearing of the final accounting which was set for September 28, 1990, and at which The Probate Court of Huron

County approved her final accounting and discharged her from her capacity as a fiduciary, and that discharge pursuant to R.C. 2109.35 had "the affect of a judgment."

Of course, the right to notice and an opportunity to substitute the new party in interest may be waived by a person as long as it is done knowingly, voluntarily, and intelligently, *Overmeyer vs Frick Co.* 405 U.S. 174, 31L. Ed.2d 92, S.Ct.775, 61 O.Ops.2d 528 (1972). Respondent fails to see how under these set of circumstances Petitioner's right to notice and a Hearing was in any way violated pursuant to The Due Process Clause of the 5th and 14th amendment to The U.S. Constitution or The Ohio Constitution. Petitioner filed her final accounting and asked to be discharged as the fiduciary. The Court scheduled a hearing September 28, 1990 and did exactly what she asked the Court to do. Respondents fail to see any constitutional violations.

### B. The Ohio Appellate Court properly interpreted R.C. 2109.35.

Ohio Revised Code Section 2109.35 provides in pertinent part as follows:

> The order of the Probate Court upon the settlement of a fiduciary's account shall have the affect of a Judgment.

The Ohio Statute sets forth only four exceptions under which such an Order may be vacated:

> A. . . .for fraud. . . .,
>
> B. . . .for good cause shown other than fraud, upon Motion of any person affected by the Order who was not a Party to the proceeding in which the Order was made. . . .and who had no knowledge of the proceeding in time to appear in it;
>
> C. . . .for good cause shown, other than fraud, upon Motion of any person affected by the Order who was a Party to the proceeding in which the Order was made solely by reason

of his having been served by publication . . . .,

D. . . .for good cause shown upon Motion of the fiduciary, if the Motion if filed prior to the settlement of the account showing that the fiduciary has fully discharged his trust. . . .

Petitioner could not show any basis for vacating her discharge as fiduciary pursuant to the four exceptions delineated in A thru D above. The Ohio Appellate Court correctly dismissed Petitioner's Complaint because the estate was closed and the Petitioner discharged at the time the Trial commenced. Petitioner could not show any exceptions to the affect of The Huron County Probate Court's Order of September 28, 1991, therefore, Respondents Motion for Dismissal should have been granted by the Trial Court. The Ohio Appellate Court corrected this obvious error by the Trial Court by granting Respondents Motion for Dismissal. The Appellate Court's Ruling comports with the plain language of The Ohio statute and prior Ohio case law, *In Re: Reithler,* (1956), 73 Ohio Law Abs. 328, 137 N.E. 2d. 791.

### C. Ohio Revised Code Section 2109.35 is Constitutional.

Petitioner, in essence, is attacking the constitutionality of Ohio Revised Code Section 2109.35. Petitioner believes she is entitled to a cause of action, even though she knowingly, intelligently and voluntarily closed the estate and discharged herself as fiduciary with the knowledge that there was an existing claim. It is not the Ohio procedural statute which is flawed here, but the Petitioner's own voluntary act. Petitioner received all the process that was constitutionally required. No single model of procedural fairness is dictated by the Due Process Clause, *Kramer vs Chemical Construction Corp.* 456 U.S. 461, 72 L Ed 2d. 262, 102 S Ct 1883(1982); *Mitchell vs W.T. Grant.* 416 U.S. 600, 40L Ed 2d. 406, 94S Ct 1895(1974); *Inland Empire Counsel vs Millis,* 325 U.S. 697, 89 L Ed 1877,

65 S Ct. 1316 (1945).

## II. THIS CASE PRESENTS NO QUESTION OF PETITIONER'S RIGHT TO A TRIAL BY JURY.

### A. Petitioner voluntarily, knowingly, and intelligently waived her right to Trial by Jury.

When Petitioner asked the Court to approver her final and distributive account, and to be discharged from her Trust with the assistance of counsel, she waived whatever right she had at that time concerning her claim against Respondent's for Trial by Jury. It can only be assumed that Petitioner, who was represented by counsel understood the significance of being discharged as a executor of the estate.

### B. Petitioner's discharge as fiduciary for the estate of Plaintiff is not a pleading defect.

Plaintiff contends that the case at bar is a mere pleading defect. The language of R.C. 2109.35 is plain on its face and does not violate either the U.S. or Ohio constitutions concerning the right to Trial by Jury.

---

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/S/ John F. Kirwan

John F. Kirwan
SCN 0023924
189 E. Market Street
Sandusky, Ohio 44870
(419) 627-1917
FAX (419) 621-1344
Counsel for Respondents

## CERTIFICATION

I hereby certify a copy of the foregoing Respondent's Brief In Opposition has been served by ordinary U.S. Mail to Peggy Honig, Co-Counsel for Petitioner, 458 Leader Building, Cleveland, Ohio 44114 and to J. Michael Goldberg, Counsel for Petitioner, 75 Public Square, Suite 1020, Cleveland, Ohio 44113 this day of November, 1994.

/S/ John F. Kirwan

John F. Kirwan
Attorney for Respondents

Supreme Court, U.S.
FILED
NOV 18 1994
OFFICE OF THE CLERK

No. 94-617

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In the
**SUPREME COURT OF THE UNITED STATES**
October Term, 1993

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JANET LIERENZ,
*Petitioner,*

vs.

MAX BOWEN,
REGAN L. LUTZKO,
ROBERT J. HILL,
*Respondents*

---

**On Petition For A Writ Of Certiorari To The Erie County Court of Appeals of Ohio**

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# APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

---

John F. Kirwan
Counsel of Record

189 E. Market Street
Sandusky, Ohio 44870
(419) 626-1917
FAX (419) 621-1344
Attorney for Respondents

## APPENDIX

Motion to Dismiss . . . . . APPENDIX A

Memorandum in Support of Motion to Dismiss . . APPENDIX B

Certificate to copy of paper on file
Probate Court - Huron County . . . . . APPENDIX C

Fiduciary's Final Account (Filed 8-13-90) . . . . . APPENDIX D

Entry setting Hearing and Ordering
Notice (filed 8-13-90) . . . . . APPENDIX E

Receipts and disbursements (Filed 8-13-90) . . . . APPENDIX F

Entry Approving and Settling Account
(Filed 9-28-90) . . . . . APPENDIX G

Ohio Revised Code 2109.35 . . . . . APPENDIX H

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

| | | |
|---|---|---|
| JANET LIERENZ | : | CASE NO. 88-CV-129 |
| *Plaintiff,* | : | JUDGE ANN B. MASCHARI |
| -vs- | : | **MOTION TO DISMISS** |
| MAX BOWEN, et al. | : | John F. Kirwan<br>Attorney for Defendants |
| *Defendant* | : | Reg. #: 0023924<br>189 E. Market Street |
| | : | Sandusky, Ohio 44870<br>(419) 626-1917 |

---

Now comes Defendant and respectfully moves this Court to dismiss Plaintiff's Complaint for the reasons set forth in the attached Memorandum.

Respectfully submitted,

/S/ John F. Kirwan

John F. Kirwan
Attorney for Defendants

---

**CERTIFICATION**

This is to certify that a copy of the foregoing Motion to Dismiss and Memorandum have been served upon Attorney for Plaintiff, K. Ronald Bailey, P. O. Box 830, Sandusky, Ohio 44870 by regular U. S. Mail this 15th day of January, 1992.

/S/ John F. Kirwan

John F. Kirwan
Attorney for Defendants

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

| | | |
|---|---|---|
| JANET LIERENZ | : | CASE NO. 88-CV-129 |
| *Plaintiff,* | : | JUDGE ANN B. MASCHARI |
| -vs- | : | **MEMORANDUM** |
| MAX BOWEN, et al. | : | John F. Kirwan<br>Attorney for Defendants |
| *Defendant* | : | Reg. #: 0023924<br>189 E. Market Street |
| | : | Sandusky, Ohio 44870<br>(419) 626-1917 |

---

Plaintiff's duties as the representative of the Estate of decedent were terminated on September 28, 1990. Paintiff in fact, signed the Final Accounting and her duties were terminated by the Huron County Probate Court, (see attached Judgment Entry of 9-29-91). No reservation of authority was provided to Plaintiff in her representative capacity to continue to represent the Estate of the decedent in this law suit.

**ISSUE:** Can the Plaintiff, as alleged representative of the Estate of the decedent, continue her claim where the Probate Court that appointed her has discharged her from her duties as Fiduciary?

The answer is "no." Plaintiff's right to suit in a representative capacity, only continues so long as she has such authority. Once her authority is terminated by the Probate Court, she likewise loses her authority.

O.R.C. 2109.35 Effect of Order Settling Account, provides in pertintent part:

> "The Order of the Probate Court upon the settlement of the Fiduciary's Account shall have the effect of a Judgement and may be vacated only as follows:
>
> In the Case at Bar, the Final Accounting shows that the Plaintiff, Fiduciary knew about her claim and showed it as -0-. This operates as a Judgement and can only be vacated for one

of the reasons set forth in 2109.35, none of which apply to the Case at Bar, and which, in any event, can only be done by the Probate Court of Huron County.

Further, Plaintiff's Final Accounting, a copy of which is attached, and which is the only accounting made to the Probate Court of Huron County, does not show any payout for any of the alleged wages due pursuant to the Contract marked Exhibit "A". Plaintiff further is not aware these wages were paid and knows in fact that the Estate did not pay these wages (see attached Deposition, PP. 23-24).

For the above reasons, Defendants respectfully request that Plaintiff's Complaint be dismissed.

Respectfully submitted

/S/ John F. Kirwan

John F. Kirwan
Attorney for Defendants

APPENDIX B-2

THE COURT OF COMMON PLEAS
PROBATE DIVISION
HURON COUNTY, OHIO

## CERTIFICATE TO COPY OF PAPER ON FILE

I, the undersigned, Judge of the Court of Common Pleas, Probate Division within and for said County, and in whose custody the **Files, Journals and Records** of said Court are required by the laws of the State of Ohio to be kept, do hereby certify that the foregoing is taken and copied from the original fiduciary's account and entry approving and settling account in the estate of Karl R. Lierenz Case Number 86-30312 Docker Number 49 Page 495.

now on file in said Court, that it has been compared by me with said original documents, and that it is a true and corect copy thereof. **IN TESTIMONY WHEREOF,** I hereunto subscribe my name officially, and affix the seal of said Court, at the Courthouse in Norwalk in said County, this 15th day of January, 1992.

THOMAS E. HEYDINGER, Judge

/S/ Patricia J. Burr

Deputy Clerk

APPENDIX C-1

PROBATE COURT OF HURON COUNTY, OHIO

ESTATE OF KARL R. LIERENZ, DECEASED
Case No. 86-30312, Docket 49, Page 495

## FIDUCIARY'S ACCOUNT

[For Executors and all Administrators]

The Fiduciary offers an account of his trust, given below and on the attached itemized statement of receipt and disbursements, and accompanying vouchers. The fiduciary says that to his knowledge the account is correct and asks that it be approved and settled.

**[Check one of the following four paragraphs]**

☐ This is a partial account. A statement of the assets remaining in the fiduciary's hands is attached.

☐ This is a final account. A statement of the assets remaining in the fiduciary's hands for distribution to the beneficiaries is attached.

☐ This is a distributive account, and the fiduciary asks to be discharged from his trust upon its approval and settlement.

☒ This is a final and distributive account, and the fiduciary asks to be discharged from her trust upon its approval and settlement.

[Complete if this is a partial account, or if one or more accounts have previously been filed in the estate. The period of this account is from

_____ to _____

APPENDIX D-1

This account is recapitulated as follows:

RECEIPTS

| | |
|---|---|
| Personal property of decedent [not sold] | |
| 23, 255, 21 ± 42, 370.00 = | $ 65,625.21 |
| Proceeds from sale of personal property | N/A |
| Real estate of decedent [not sold] | N/A |
| Proceeds from sale of real estate | N/A |
| Income | N/A |
| Other receipts advanced by Janet Lierenz, | |
| Debt Assumed | 63,049.64 |
| Total receipts | $ 128,674.85 |

DISBURSEMENTS

| | |
|---|---|
| Fiduciary fees [this accounting period] | -0- |
| Attorney fees [this accounting period] | 2,422.73 |
| Other administration costs and expenses | |
| Court Costs | 86.99 |
| Debts and claims against estate | 82,890.64 |
| | 85,420.36 |
| Ohio and federal estate taxes | -0- |
| Personal property distributed in kind | 42,370.00 |
| Real property transferred | N/A |
| Other distributions to beneficiaries, cash | 904.49 |
| Other disbursements | -0- |
| Total disbursements | $ 128,674.85 |

BALANCE REMAINING IN FIDUCIARY'S HANDS -0-

/S/ Janet Lierenz
Fiduciary Janet Lierenz

ENTRY SETTING HEARING AND ORDERING NOTICE

The court sets September 28, 1990 at 10:00 o'clock A.M. as the date and time for hearing the above account, and orders notice of the hearing to be given as provided by law and the Rules of Civil Procedure.

August 13, 1990

/S/ Thomas E. Heydinger
Probate Judge

PROBATE COURT OF HURON COUNTY, OHIO

Estate of Karl R. Lierenz, Deceased
Case No. 86-30312, Docket 49, Page 495

## RECEIPTS AND DISBURSEMENTS

[Attach to fiduciary's account]

Following is an itemized statement of receipts and disbursements by the fiduciary in the administration of his trust.

| Item | Voucher No. | Value or Amount Collected | Value or Amount |
|---|---|---|---|
| Accounts Receivable: | | $ | $ |
| Certainteed, Rt. 250 N., | 300 | | |
| Milan, OH | 8200 | 8,500.00 | 8,500.00 |
| Celotex, P.O. Box 286, | 900 | | |
| Port Clinton, OH | 1100 | -0- | 2,000.00 |
| Modified Concrete Suppliers | | | |
| 140 S. Neal Ave., Indianapolis, IN | | -0- | 200.00 |
| Joe Hammersmith, 1405 Kingsway | | | |
| West Lake, OH 44145 | | -0- | 260.00 |
| Matte Linder, Zenobia Road, | | | |
| Norwalk, OH | | -0- | 294.30 |
| Marlene Draper, Zenobia Road | | | |
| Norwalk, OH | | -0- | 438.34 |
| Pete Brummitt | | -0- | 370.00 |
| Don Wallace, 643 Sunnyside, | | | |
| Vermilion, OH | | 1,000.00 | 1,370.25 |
| Crown Motel, Rt. 250 N., | | | |
| Milan, OH | | -0- | 30,000.00 |
| George Lierenz, 111 Norwood, | | | |
| Norwalk, OH | | 10,416.00 | 10,416.00 |

| Item | Voucher No. | Value or Amount Collected | Value or Amount |
|---|---|---|---|
| Accounts Receivable: | | $ | $ |
| Keith O'Dell, 2265 St. Rt. 13 S., Greenwich, OH | | 3,339.21 | 4,000.00 |
| TOTAL | | 23,255.21 | 57,848.89 |
| Accounts Collected | | | -23,255.21 |
| Accounts Not Collectible | | | 34,593.68 |

APPENDIX F-2

| Item<br>Tangible Personal Property | Voucher<br>No. | Value or<br>Amount | Value or<br>Amount |
|---|---|---|---|
| 1974 Mac Tractor and 1946 Rogers flat bed trailer | | | $ 1,120 |
| Hand and Power Tools | | | 700 |
| Hester 317 | | | 275 |
| Snow Blower 441 | | | 100 |
| Rotary Hammer 825/Scoup | | | 350 |
| 1973 Ford Dump Truck | | | 2,500 |
| Jack Hammer 862, $400 2/motor 150 | | | 550 |
| Mag Float | | | 100 |
| Small Tools | | | 100 |
| Hilti Hammer | | | 500 |
| 1982 Ford Pick-up Truck | | | 3,275 |
| 1985 Ford Pick-up | | | 5,800 |
| Grinders (2) | | | 100 |
| Engine Crane | | | 50 |
| Air Compressor | | | 400 |
| Duetz Tractor, plows & snow blower | | | 6,000 |
| J. D. Loader | | | 18,000 |
| Post Hole Digger | | | 300 |
| Cut Off Saw | | | 200 |
| Portable Welders (2) | | | 1,200 |
| Parts Cleaner | | | 150 |
| Shop Air Compressor | | | 600 |
| | | | 42,370 |

/S/ Janet Lierenz

Fiduciary

Janet Lierenz

APPENDIX F-3

PROBATE COURT OF HURON COUNTY, OHIO

ESTATE OF Karl R. Lierenz, Deceased
Case No. 86-30312, Docket 49, Page 495

ENTRY APPROVING AND SETTLING ACCOUNT

Upon hearing the account of the fiduciary, filed in this court on August 13, 1990, the court finds that:

The fiduciary has administered the estate lawfully and in accord with his powers;

[Check whichever of the following are applicable]

☐ The estate has been fully administered, except for final distribution to the beneficiaries;

☒ The estate has been fully administered and the assets have been distributed in accord with law and the applicable instruments governing distribution;

☒ The events have occured after which the Court may approve and settle a final account.

The account is therefore approved and settled.

[Check if applicable] - ☒ The fiduciary is discharged from his trust.

September 28, 1990 — Date

/S/ Thomas E. Heydinger — Probate Judge

APPENDIX G-1

## 2109.35 Effect of order settling account

The order of the Probate Court upon the settlement of a fiduciary's account shall have the effect of a judgment and may be vacated only as follows:

(A) The order may be vacated for fraud upon the court's own order, if the motion is filed or order is made within one year after discovery of the existence of the fraud. Any person who is subject to any legal disability may file the motion at any time within one year after the removal of the legal disability or within one year after he discovers the existence of the fraud, whichever is later, or his guardian or a successor guardian may do so during the period of the legal disability. If the death of any person occurs during the period within which he could have filed the motion, his administrator or executor may file it within one year after the person's death.

(B) The order may be vacated for good cause shown, other than fraud upon motion of any person affected by the order who was not a party to the proceeding in which the order was made and who had no knowledge of the proceeding in time to appear in it; provided that, if the account settled by the order is included and specified in the notice to that person of the proceeding in which a subsequent account is settled, the right of that person to vacate the order shall terminate upon the settlement of the subsequent account. A person affected by an order settling an account shall be deemed to have been a party to the proceeding in which the order was made if that person was served with notice of the hearing on the account in accordance with section 2109.33 of the Revised Code, waived the notice, consented to the approval of the account, or is bound by section 2109.34 of the Revised Code; but no person in being who is under legal disability at the time of that proceeding shall be deemed to have been a party to that proceeding unless he was represented in it as provided in section

2111.23 of the Revised Code. Neither the fiduciary nor his surety shall incur any liability as a result of the vacation of an order settling an account in accordance with this division, if the motion to vacate the order is filed more than three years following the settlement of the fiduciary's account showing complete distribution of assets; but the three-year period shall not affect the liability of any heir, devisee, or distributee either before or after the expiration of that period.

(C) The order may be vacated for good cause shown, other than fraud, upon motion of any person affected by the order who was a party to the proceeding in which the order was made solely by reason of his having been served by publication in a newspaper in accordance with section 2109.33 of the Revised Code, if the motion is filed within one year after that person acquires knowledge of the proceeding and, in any event, within three years after the order is made. The person shall establish to the satisfaction of the Court that he had no knowledge of the proceeding in time to appear in it.

(D) The Order may be vacated for good cause shown upon motion of the fiduciary, if the motion is filed prior to the settlement of the account showing that the fiduciary has fully discharged his trust.

A motion to vacate an order settling an account shall set forth the items of the account with respect to which complaint is made and the reasons for complaining of those items. The person filing a motion to vacate an order settling an account, or another person the court may designate, shall cause notice of the hearing on the motion to be served upon all interested parties who may be adversely affected by an order of the court granting the motion.

An order settling an account shall not be vacated unless the

court determines that there is good cause for doing so, and the burden of proving good cause shall be upon the complaining party.

The vacation of an order settling an account, made after notice given in the manner provided in section 2109.32 or 2109.33 of the Revised Code, shall not affect the rights of a purchaser for value in good faith, a lessee for value in good faith, or an encumbrancer for value in good faith; provided that, if the fiduciary has effected any such sale, lease, or encumbrance, any person prejudiced by it may proceed, after vacation of the order, against any distributee benefiting from the sale, lease, or encumbrance to the extent of the amount received by that distributee on distribution of the estate or trust, or if any heir, devisee, or distributee has effected any such sale, lease, or encumbrance, any person prejudiced by it may proceed, after the vacation of the order, against that heir, devisee, or distributee, to the extent of the value at the time of alienation of the property aliened by him, with legal interest.